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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

CAPITAL CASE

WILLIAM VAN POYCK,

Petitioner,

vs.

JAMES V. CROSBY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

-CAPITAL CASE-

The questions presented in this CAPITAL CASE are:

1. HAS *CABANA V. BULLOCK'S* HOLDING THAT THERE IS NO CONSTITUTIONAL BAR TO AN APPELLATE COURT MAKING THE REQUISITE THRESHOLD *ENMUND/TISON* FACTUAL FINDING IN NON-TRIGGERMAN, NON-PREMEDITATED FELONY MURDER CASES, SUCH AS VAN POYCK'S, BEEN IMPLICITLY ABROGATED BY *RING V. ARIZONA'S* HOLDING THAT THE SIXTH AMENDMENT REQUIRES THAT "DEATH ELIGIBILITY" FACTUAL FINDINGS BE MADE BY A JURY?

2. MUST THIS COURT SET ASIDE VAN POYCK'S DEATH SENTENCE AND HOLD FLORIDA'S CAPITAL SENTENCING STATUTE UNCONSTITUTIONAL ON THE BASIS THAT *HILDWIN V. FLORIDA* HAS BEEN IMPLICITLY ABROGATED BY *RING V. ARIZONA*, AND WHERE A MAJORITY OF THE SUPREME COURT OF FLORIDA HAS AGREED THAT *RING* DOES APPLY TO AND AFFECT § 921.141, BUT NEVERTHELESS DECLINED TO INVALIDATE § 921.141 UNTIL THIS COURT SPECIFICALLY DIRECTS IT TO DO SO?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Van Poyck, a state prisoner under sentence of death for a conviction of felony murder, respectfully moves this Honorable Court to issue a writ of *certiorari* to review the decision of the Supreme Court of Florida, rendered on August 20, 2003, denying Van Poyck's petition for Writ of Habeas Corpus, with rehearing denied on October 31, 2003.

OPINIONS BELOW

The Supreme Court of Florida's October 31, 2003, Order Denying Petitioner's Motion for Rehearing, and the August 20, 2003, Order Denying Petition for Writ of Habeas Corpus appear in Petitioner's Appendix at A1 and B1, respectively. The reported decision of the Supreme Court of Florida, affirming Van Poyck's convictions and sentences on direct appeal, *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990), appears in Petitioner's Appendix at C1 through C9. The state trial court's sentencing order appears in Petitioner's Appendix at D1 through D5.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The opinion of the Supreme Court of Florida sought to be reviewed was rendered on August 20, 2003. Petitioner's timely motion for rehearing was denied on October 31, 2003.

2. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C § 1257(a), and Rule 10(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition raises issues under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as §§ 775.082 and 921.141, Florida Statutes (1987), as set forth in Petitioner's Appendix at G1–G2.

STATEMENT OF THE CASE

A. Basis for Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to Rule 10(c), Rules of the Supreme Court of the United States, and Title 28 U.S.C. § 1257(a), in that the court below, the Supreme Court of Florida, has ruled upon important

constitutional questions in a way which conflicts with relevant decisions of this Court.

B. Underlying Facts and Proceedings Below

The evidence presented at Van Poyck's trial has been summarized by the Florida Supreme Court's decision on direct appeal in *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990). Briefly, the record reflects that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prisoner at Glades Correctional Institution, to a dermatologist's office in West Palm Beach. After pulling into the parking lot they were confronted by Van Poyck and his co-defendant, Frank Valdes, both armed with pistols. Van Poyck ordered Turner from the passenger's side and forced him underneath the van. Meanwhile, Valdes forced Officer Griffis to the rear of the van where the door was. While under the van, Officer Turner saw Griffis' feet as he exited the driver's side of the van, along with another person who forced Griffis to the rear. Almost immediately, while watching the two pairs of feet at the rear of the van, Turner heard gunshots and saw Officer Griffis fall to the ground.

Van Poyck and Valdes were tried separately; Van Poyck was tried first. The central dispute at trial was the identity of the triggerman. Van Poyck testified, and vehemently denied shooting the victim or even having seen it occur. Van Poyck's counsel argued that the evidence showed that Valdes shot Officer Griffis, while the State argued that circumstantial evidence showed that Van Poyck fired the fatal shots. Van Poyck was convicted of first-degree murder. During the penalty phase the prosecutor again argued that Van Poyck was the triggerman. Van Poyck was subsequently sentenced to death.

On Van Poyck's direct appeal, the Florida Supreme Court held that the evidence was legally insufficient to establish that Van Poyck was the triggerman, and further held that the evidence was legally insufficient to support a conviction of premeditated murder. *Id.* at 1069-70. The Court nonetheless

upheld Van Poyck's conviction for first-degree felony murder, and upheld his death sentence. *Id.* at 1071.[1]

In 1992, Van Poyck filed a post-conviction Rule 3.850 motion in the trial court, raising numerous issues. Following an evidentiary hearing, the trial court denied all relief. On appeal a divided Florida Supreme Court, in a 4-3 decision, affirmed the denial of relief. *Van Poyck v. State*, 694 So.2d 686 (Fla. 1997). This Court denied *certiorari* review. *Van Poyck v. Florida*, 522 U.S. 995 (1997).

In 1997 Van Poyck filed two state habeas corpus petitions in the Supreme Court of Florida. Central to the first was a claim of ineffective assistance of appellate counsel based on his botching of a meritorious voir dire argument by referencing the wrong two jurors. On May 14, 1998, the Supreme Court of Florida, in another 4-3 split, denied that petition. *Van Poyck v. Singletary*, 715 So.2d 930 (Fla. 1998). This Court again denied *certiorari* review. *Van Poyck v. Singletary*, 199 S.Ct. 1252 (1999). The second petition followed discovery of facts showing that Van Poyck's counsel on direct appeal was addicted to drugs, mentally ill, and eventually disbarred by the Supreme Court of Florida and argued per se ineffectiveness. It was denied without opinion on December 1, 1998. *Van Poyck v. Singletary*, 728 So.2d 206 (Fla. 1998).

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[1] The Florida Supreme Court upheld Van Poyck's felony murder death sentence by referring obliquely to *Tison v. Arizona*, 481 U.S. 137 (1987). The court's *Tison* analysis, at 1070-71 was as follows:

> Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Thus, the court upheld a death sentence in a non-premeditated murder, for a non-triggerman, based upon a finding that Van Poyck "played a major role" in an attempted escape, and "that he knew lethal force could be used."

Van Poyck next filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida. The district court denied relief on all claims on September 20, 1999. The district court certified for appeal two of Van Poyck's fifteen claims. The Eleventh Circuit expanded the Certificate of Appealability to include four more issues, but denied certification for the remaining claims.

Van Poyck appealed to this Court seeking further expansion of the Certificate of Appealability to include three issues which Van Poyck asserted were his most substantial claims. This Court ordered the Clerk of the Eleventh Circuit to "transmit immediately the entire record" in Van Poyck's then pending appeal via a letter from the Supreme Court clerk dated May 31, 2001. The Eleventh Circuit transmitted the record to this Court after the Eleventh Circuit had ruled upon and denied Van Poyck's appeal, on all six presented claims, on May 9, 2002. *Van Poyck v. Moore*, 290 F.3d 1318 (11th Cir. 2002). This Court then denied Van Poyck's *certiorari* petition that had sought an expanded Certification of Appealability on October 7, 2002, and thereafter denied *certiorari* review on the merits of three of the claims denied by the Eleventh Circuit's May 9, 2002 decision. *Van Poyck v. Moore*, 123 S.Ct. 869 (2003).

In December, 2002, Van Poyck filed a petition for Writ of Habeas Corpus in the Supreme Court of Florida, based on this Court's intervening decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). In that petition, Van Poyck presented the same two claims presented herein. On August 20, 2003, the Florida Supreme Court denied the petition, and on October 31, 2003, the Florida Supreme Court denied Van Poyck's Motion for Rehearing.

C. Facts Pertaining to Questions Presented

Facts Pertaining to Question I

At Van Poyck's trial the primary factual dispute involved the identity of the triggerman, and whether the

shooting was premeditated. During both the guilt and penalty phase the State repeatedly argued that Van Poyck shot the victim, despite considerable evidence to the contrary. At the conclusion of the guilt phase the case went to the jury under dual theories of first-degree premeditated murder, and first-degree felony murder. The trial court submitted to the jury a separate "special verdict form." The jury was first instructed to unanimously determine if Van Poyck was guilty of "first-degree murder." It was then asked to determine more specifically if it found Van Poyck guilty of "premeditated murder", "felony murder" and/or "both". The jury was to check "premeditated murder" if *any* juror found Van Poyck guilty of only "premeditated murder"; "felony murder" if *any* juror found Van Poyck guilty of only "felony murder"; and, "both" if *any* juror found Van Poyck guilty of "both".

The jury returned a verdict of guilty of first-degree murder. The jury also checked the box for "felony murder", and the box for "both" – meaning that anywhere from one to eleven jurors believed Van Poyck was guilty of premeditated murder and, by necessity, was the actual killer. *See* Petitioner's Appendix at F1.

Following the penalty phase, the trial court instructed the jury regarding aggravators and the nature of Florida's advisory sentence recommendation. The trial court also offered its own cobbled together instruction incorporating parts of *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987) (hereinafter "*Enmund/Tison*"), which establish the threshold criteria for imposing a death sentence in a felony murder case. Van Poyck objected to the language of this instruction as misleading, confusing and woefully deficient. At the conclusion of the penalty phase, the jury recommended death by a vote of 11 to 1. *See* Petitioner's Appendix at E1.

The trial court followed the jury's recommendation and sentenced Van Poyck to death on December 21, 1988. *See* Petitioner's Appendix at D1. In its written sentencing order, the

trial court judge found that "the State clearly presented competent and substantial evidence as to first-degree felony murder and/or first-degree premeditated murder *an in reality presented competent evidence that Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.*" *See* Petitioner's Appendix at D3 (emphasis added).

However, on direct appeal, the Supreme Court of Florida disagreed with the trial court. While upholding Van Poyck's' conviction for first-degree felony murder, the Court, citing insufficiency of the evidence, specifically acquitted Van Poyck of first-degree premeditated murder, and acquitted him of being the triggerman.[2] *See* Petitioner's Appendix at C6-C8. Responding to Van Poyck's direct appeal claim that the trial court and jury had found that Van Poyck was the triggerman (and the *Enmund/Tison* jury instruction had been patently defective), the Florida Supreme Court, in accordance with the dictates of *Cabana v. Bullock*, 474 U.S. 376 (1986), purported to make its own *Enmund/Tison* factual findings necessary to uphold the death sentence in a non-triggerman felony murder case:

> Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez [sic] arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Id. 564 So.2d at 1070-71. Thus, with the above holding (the only *Enmund/Tison* factual findings ever rendered in this case) the Florida Supreme Court upheld a death sentence in a

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[2] Thus, the primary basis, according to the State and the trial judge, and presumably for the jury, for sentencing Van Poyck to death in the first place – that he was allegedly the triggerman in a premeditated murder – was rejected, as a matter of fact and law, by the Supreme Court of Florida.

non-premeditated murder case, for a non-triggerman, based only on the supreme court's finding that Van Poyck "played a major role" in an attempted escape and "that he knew lethal force could be used."[3]

Facts Pertaining to Question II

Van Poyck was tried and convicted under Florida's capital murder statute, § 775.082 (1987), and sentenced to death under Florida's capital sentencing statute, § 921.141 (1987), both of which are still in effect. This Court is familiar with both statutes. *See, e.g., Hildwin v. Forida*, 490 U.S. 638 (1989). In accordance with Florida law, Van Poyck's penalty phase jury heard evidence and then returned a non-binding advisory recommendation (by a vote of 11-1) of death. However, as required by Florida law, it was the Florida trial judge who made specific written factual findings regarding the existence or nonexistence of aggravating and mitigating circumstances, and who actually imposed the sentence of death based upon those specific written findings. *See* § 775.082, Fla. Stat.; § 921.141(3)(b), Fla. Stat. (mandating that the trial judge make the required factual findings, in writing, and impose any sentence of death).

On direct appeal, Van Poyck specifically challenged the constitutionality of § 921.141, Fla. Stat., for its failure to require that *the jury* make specific written factual findings supporting the jury's death recommendation. This claim was summarily rejected by the Florida Supreme Court. *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990). In his 1990 Petition for Writ of Certiorari to this Court (Issue I therein), Van Poyck again challenged the constitutionality of § 921.141, Fla. Stat., for its failure to require that *the jury* make specific written factual findings supporting the jury's death recommendation. This

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[3] Left unanswered by the Court was the new question following from its decision, i.e., how could it constitutionally uphold a death sentence that had been predicated upon facts (that Van Poyck was the triggerman in a premeditated murder) which the Court itself had just rejected.

Court denied certiorari. *Van Poyck v. Florida*, 499 U.S. 932 (1991).

In *Bottoson v. Moore*, 833 So.3d 693 (Fla. 2002), *cert denied*, 123 S.Ct. 662 (2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002), *cert. denied*, 123 S.Ct. 657 (2002), the Florida Supreme Court considered the impact of *Ring v. Arizona*, 536 U.S. 584 (2002) on Florida's capital sentencing statute, § 921.141, Fla. Stat. In *Bottoson*, the definitive decision, each of Florida's seven Supreme Court Justices issued a separate opinion. Importantly, *a majority of the Court* agreed that *Ring* did in fact apply to, and affect, § 921.141, though that majority disagreed as to the extent. Nonetheless, the Court unanimously denied relief by claiming that it was "without authority" to endorse *Ring* and thus invalidate the two decades worth of prior United States Supreme Court precedents upholding the constitutionality of § 921.141 because those precedents may be overruled only explicitly, by this Court.[4]

REASONS FOR GRANTING THE WRIT

Ring v. Arizona's holding that the Sixth Amendment requires fundamental factual findings that "expose" a defendant to a death sentence to be made by a jury calls into question the continuing viability of *Cabana v. Bullock's* holding that there exists no Sixth Amendment bar to an appellate court, as opposed to a jury, making the requisite threshold *Enmund/Tison* factual findings that make a defendant "death eligible" in non-triggerman felony murder cases. Such findings are necessary to "expose" such a defendant to a greater sentence than would otherwise be allowed, just as aggravating circumstances are so required in all capital cases. It is thus impossible to square *Ring* with *Cabana*.

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[4] Following *Bottoson*, the Supreme Court of Florida has simply summarily denied, without opinion or citation, all *Ring*- based challenges to § 921.141, just as the Court did with Van Poyck's Habeas Corpus Petition. *See* Petitioner's Appendix at B1.

In short, just as this Court found in *Ring* that its Sixth and Eighth Amendment jurisprudence "cannot be home" to both *Apprendi* and *Walton v Arizona*, 497 U.S. 639 (1990) so it cannot be home to both *Ring* and *Cabana*. This conclusion follows almost inexorably from *Ring*, but it is a conclusion that the courts below have not been willing to reach without further direction from this Court. Issue I provides this Court with the opportunity to provide the necessary guidance and clarification to the nation's courts, resolving a conflict of vital importance to the fair administration of capital jurisprudence nationwide.

Issue II presents a broader issue, namely the effect of *Ring* on the Florida death penalty statute. It is clear that *Ring v. Arizona* has implicitly abrogated *Hildwin v. Florida* and has necessarily rendered unconstitutional Florida's capital sentencing statute, § 921.141, which is virtually identical to the Arizona capital statute struck down in *Ring*. In short, *Ring* applies to Florida. A majority of the Supreme Court of Florida, in *Bottoson v. Moore*, has already reached this conclusion, agreeing that *Ring* applies to § 921.141. Notwithstanding that, the *Bottoson* court recognized that it lacked the authority to recede from two decades worth of United States Supreme Court precedent upholding the constitutionality of § 921.141. *Bottoson*, *supa* at 695. Finally, this issue provides this Court with an opportunity to announce that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), does not survive *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*.

ARGUMENT I

CABANA V. BULLOCK'S HOLDING THAT THERE IS NO CONSTITUTIONAL BAR TO AN APPELLATE COURT MAKING THE REQUISITE THRESHOLD EDMUND/*TISON* FACTUAL FINDINGS IN NON-TRIGGERMAN, NON-PREMEDITATED FELONY MURDER CASES, SUCH AS VAN POYCK'S, HAS BEEN IMPLICITLY

ABROGATED BY RING *V. ARIZONA'S* HOLDING THAT THE SIXTH AMENDMENT REQUIRES THAT "DEATH ELIGIBILITY" FACTUAL FINDINGS BE MADE BY A JURY.

In *Enmund v. Florida*, this Court reversed a death sentence due to Eighth Amendment concerns because the Florida Supreme Court had affirmed the sentence "in the absence of proof that [the defendant] had killed or attempted to kill, and regardless of whether [the defendant] intended or contemplated that life would be taken." *Id.* at 801. In *Tison v. Arizona*, this Court refined *Enmund* and articulated a two-part test which must be satisfied before death sentence may be imposed in a felony murder case. In particular, factual findings must be made that:

- the defendant was a major participant in the felony committed, and
- the defendant acted with reckless indifference to human life.

Id. at 158.

In *Cabana v. Bullock*, this Court held that there was no constitutional bar to an appellate court making *Enmund*'s required factual finding that a defendant killed, attempted to kill, or intended to kill. Specifically, this Court rejected the argument that the Sixth Amendment required that this factual finding be made by a jury.

Following *Cabana*, appellate courts were permitted to make *Enmund/Tison* factual findings in cases in which a jury had failed to do so – indeed that is precisely what the Supreme Court of Florida purported to do on Van Poyck's direct appeal. Later, in *Walton v. Arizona*, 497 U.S. 639 (1990), this Court specifically relied upon *Cabana* to find that likewise, there was

no Sixth Amendment requirement that a jury (as opposed to a judge or reviewing court) find the existence of "aggravating circumstances" necessary for imposition of a death sentence. *Walton* stood for the proposition that states are not required to label aggravating circumstances "elements" of an offense, or ensure that only juries determine the existence of such circumstances. The dispositive questions in both *Walton* and *Cabana* were the same – whether the particular factual finding at issue (i.e., the finding of an aggravator in *Walton*, the *Enmund/Tison* finding in *Cabana*) was properly classified as an "element of the offense" – in which case it must be found by a jury. *Cabana* and *Walton* were, in effect, joined at the hip, a fact later acknowledged by this Court in *Ring v. Arizona*. Together, they told state courts that Constitutionally-required "death eligibility" findings need not be made by a jury.

Ring changed all of this. In *Ring*, this Court resolved what had been a clear rift between this Court's prior decisions in *Walton* and *Cabana*, on the one hand, and *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), on the other. *Jones*, *Apprendi*, and now *Ring*, wash away the significance of whether the finding at issue is properly classified as an "element of the offense," and instead make a more substantive inquiry: whether the finding had the effect of exposing the defendant to a greater punishment than that authorized by the jury's verdict alone. As characterized by this Court in *Ring*, *Jones* first "suggested" that any fact (other than a prior conviction[5]) increasing the maximum penalty for a crime must be found by a jury. *Ring*, 122 S. Ct. at 2436. *Apprendi* made this rationale explicit, holding that a defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Apprendi*, 530 U.S. 483. And finally, in *Ring*, this Court applied this rationale to capital cases. In *Ring*, the State of Arizona argued to this Court that, because Arizona law provided for death as a sentencing option for the first-

[5] *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

degree murder for which Ring was convicted, Ring's court-imposed death sentence was within the range of punishment authorized by his guilt verdict, even though the jury had not made the findings necessary for such a sentence. This Court disagreed:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." In effect, "the required finding [of an aggravated circumstance] expose[d] [*Ring*] to a greater punishment than that authorized by the jury's guilty verdict.

Ring, 122 S. Ct. at 2440 (quoting *Apprendi*, 530 U.S. at 494). In reaching its decision, this Court expressly overruled *Walton*. By implication, by logical necessity, it overruled *Cabana*. It is simply impossible to reconcile *Cabana* with *Ring*, and *Cabana* must fall.

As this Court well knows, in felony murder, non-triggerman cases, the *Enmund/Tison* factual findings are *threshold* findings necessary to make a defendant *eligible* for a death sentence.[6] Absent such *Enmund/Tison* factual findings, a

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[6] Aside from the Florida Supreme Court's unexplained denial in this case, the single lower court decision to actually analyze this issue to date determined that *Cabana* was not overruled by *Ring* based on the notion that an *Enmund/Tison* finding is a "limiting factor" rather than an "enhancing factor," and that "a defendant must be found eligible for death penalty [sic] before the *Enmund/Tison* determination becomes relevant." *Brown v. State*, 67 P.3d 917, ¶ 12 (Okla. App. 2003). This semantical exercise misses the mark; it could be equally said that the requirement that there be an aggravating circumstance is a "limiting factor" that does not come into play until after the necessary *Enmund/Tison* finding is made. In non-triggerman cases both an *Enmund/Tison* finding and aggravating circumstances are necessary to make a non-triggerman defendant "death eligible." *Ring* requires that those findings necessary to "expose" a defendant to the death penalty must be made by a jury and expressly rejects the "form over substance"-type reasoning employed in *Brown*. *Ring*, 122 S. Ct. at 2439.

defendant convicted of felony murder alone *cannot* be sentenced to death under the Eighth Amendment, no matter how many "aggravators" he may or may not have.[7]

Turning to the facts of this case, no *Enmund/Tison* findings can be imputed to Van Poyck's jury. To state the obvious, no such findings were explicitly made – given that Florida law does not require juries to make *any* factual findings specifically or in writing. *See*, e.g., *Lambrix v. Singletary*, 520 U.S. 518 (1997) (summarizing Florida's three-stage sentencing procedure); *Hildwin v. Florida*, 490 U.S. 638 (1989) (rejecting claim that Florida's capital scheme violates the Sixth Amendment by permitting imposition of death without specific jury findings that sufficient aggravating circumstances exist). Only by implication – from the jury instructions, the recommendation of death, and the verdict form – could such findings be inferred in any given case. In this case, no such inference is possible.

First, *Van Poyck*'s *Enmund/Tison* instruction (given over his objections) was patently defective. *Enmund* held that Eighth Amendment concerns required as a prerequisite to any death sentence, a finding that the defendant killed or attempted to kill, or intended or contemplated that a killing take place or that lethal force will be employed. *Id.* at 797, 801 (emphasis added). In *Tison*, this Court refined *Enmund* and articulated a two-part test which must be satisfied prior to imposition of a death sentence in felony murder cases. In particular, factual findings must be made that: 1) the defendant was a major participant in the felony committed; and 2) the defendant acted with reckless indifference to human life.

Compare the above with the jury instruction Van

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[7] Because the existence of aggravating circumstances is irrelevant to the *Enmund/Tison* inquiry, it is irrelevant that the defendant might have a prior conviction. Thus, even assuming its continued viability, *Almendarez-Torres* has no bearing on this issue.

Poyck's trial judge actually gave:

> In order to recommend a sentence of death, the jury must find that the defendant killed or attempted to kill or intended *or contemplated* that a killing would take place, or that *illegal* force be employed. However, if the jury finds that the defendant was a major participant in the felonies committed and his actions showed a reckless indifference to human life, then the jury may recommend a sentence of death even if the defendant did not actually kill or intend that a killing take place.

Petitioner's Appendix at E6 (emphasis added). The instruction allowed a death recommendation so long as *illegal* force was merely *"contemplated"*, a misstatement of the law that directly contravenes both *Enmund* and *Tison*. *Tison* held that using "contemplation of lethal force" language makes the definition of intent overly broad because it makes the standard of intent to kill little more than a restatement of the felony-murder rule itself. Moreover, Van Poyck's instruction allowed the jury to recommend death on the finding that the defendant contemplated the use of *"illegal"* (instead of "lethal") force. The difference between these two adjectives is obvious, and enormous. Countless degrees of "illegal force" fall short of "lethal force." Indeed, given that the jury had just found Van Poyck guilty of numerous "illegal acts," this instruction was tantamount to instructing the jury to make this finding, thus relieving the State of its burden of proof.[8]

Second, the jury's 11 to 1 death recommendation cannot

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[8] The trial court improperly used the word "illegal" twice: First, in the above flawed jury instruction; and, again in explaining to the jury that their "finding" must be by a majority. *See*, Petitioner's Appendix at F7 ("Your verdict finding that William Van Poyck did or did not kill Fred Griffis, did or did not intend his death, or did or did not intend that *illegal* force be employed against Fred Griffis, must be by a majority of the jury.") (emphasis added).

"imply" that *Enmund/Tison* findings were made because that recommendation was not unanimous. If, as is clear, *Enmund/Tison* findings have the effect of allowing a greater punishment than that authorized by the guilty verdict alone (such that those findings must be made by the jury), then the jury must also be unanimous. By treating death-qualifying factual predicates as the functional equivalents of elements of an offense, *Apprendi* and *Ring* impose upon those findings the same rigors of proof as any other elements. In Florida, those rigors of proof include the requirements of a unanimous jury finding on *all* elements of proof.[9]

Finally, a more fundamental problem exists, one that eliminates any doubt about whether properly-supported *Enmund/Tison* findings can be imputed to Van Poyck's jury: the jury that made the non-unanimous death recommendation was the same jury that had indicated at the guilt phase that Van Poyck was the triggerman in a premeditated murder-finding later set aside by the Florida Supreme Court. There has never been any doubt about the jury's belief, as it is reflected in their own verdict form (and, for good measure, in the trial court's sentencing order). *See*, Petitioner's Appendix at F1 (verdict form) and D1 (sentencing order). That being the case, *Enmund/Tison* findings became superfluous and automatic, since the jury had just determined – incorrectly, as the Florida Supreme Court later ruled – that Van Poyck "killed." There is no means to determine if the jury made the only finding that would allow Van Poyck to be put to death: that he was a major participant in the felony committed, and intended that lethal force be employed. Hence, there is no evidence to indicate that any jury made a proper *Enmund/Tison* finding – i.e., one based on something other than the later-repudiated finding that Van

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[9] Under well-established Florida law, all elements of an offense must be unanimously found by the jury. *See* Fla.R.Crim.Proc. 3.440; *see also*, *Jones v. State*, 92 So.2d 261 (Fla. 1956); *Bottoson v. Moore*, 833 S.2d 693 (Fla 2002) at 714 (Shaw, J., concurring) (citing precedent dating from 1838 through the present and noting that "This requirement of unanimity has been an inviolate tenet of Florida jurisprudence since the State was created.").

Poyck was guilty of premeditated murder. That problem was recognized by the Florida Supreme Court itself when, on direct appeal, it saw the necessity to make its own *Enmund/Tison* findings in the course of affirming the death sentence.

Ultimately, a remand for resentencing is required here not just by *Ring* and the Sixth Amendment, but by the Eighth Amendment – which was this Court's fundamental point in *Ring*. The Sixth Amendment requires that "death eligibility" findings, i.e., those that are constitutionally essential to the sentence, be found by a jury; the Eighth Amendment requires that, for non-triggerman defendants, such findings include not only aggravators (as in *Ring*), but *Enmund/Tison* findings as well. No such findings were made by a jury in this case – indeed, the jury determined that Van Poyck was the triggerman; while the Florida Supreme Court upheld this incorrectly–premised sentence on another set of grounds entirely. This is impermissible. Error under the Sixth Amendment cannot be avoided by giving short shrift to the narrowing process required by the Eighth. This case should be remanded so that the proper findings may be made by a jury, and the sentence based on those findings.

ARGUMENT II

THIS COURT MUST SET ASIDE VAN POYCK'S DEATH SENTENCE AND HOLD FLORIDA'S CAPITAL SENTENCING STATUTE, §921.141, UNCONSTITUTIONAL WHERE *HILDWIN V. FLORIDA*, AND §921.141, HAVE BEEN IMPLICITLY ABROGATED BY RING *V. ARIZONA*, AND WHERE A MAJORITY OF THE SUPREME COURT OF FLORIDA HAS AGREED THAT RING DOES APPLY TO AND AFFECT §921.141, BUT NEVERTHELESS DECLINED TO INVALIDATE §921.141 UNTIL THIS

COURT SPECIFICALLY DIRECTS IT TO DO SO.

A. Neither *Hildwin v. Florida* Nor §921.141, Florida Statutes, Can Survive *Ring v. Arizona*

Florida's capital sentencing procedure, §921.141, is unconstitutional inasmuch as it is rationally indistinguishable from the Arizona procedure invalidated in *Ring*. *Ring* has effectively overruled *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), which had held that the Sixth Amendment permitted Florida judges to find aggravating circumstances authorizing a death sentence on the basis that:

> [T]he existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty."

Id. at 639-640 (quoting *McMillan v. Pennsylvania*, 477 U.S. at 86). *Ring*, by reaffirming *Apprendi*'s rule of effect over form, rejects *Hildwin*'s distinction between elements and "sentencing factors," and hence left *Hildwin* with no place to stand. *Walton v. Arizona*, 497 U.S. 639 (1990), was based upon *Hildwin*, and when *Ring* expressly overruled *Walton*, it implicitly overruled *Hildwin*. *Ring* described *Walton* as follows:

> [T]his is not the first time we have considered the constitutionality of Arizona's capital sentencing system. In *Walton v. Arizona* ... we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that "the Sixth Amendment does not require that the specific

> findings authorizing the imposition of the sentence of death be made by the jury." *Id.* at 648 ... (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 ... (1989) (*per curiam*)). *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors "elements of the offense;" in both States, they ranked as "sentencing considerations" guiding the choice between life and death. 497 U.S. at 648 ...

Ring, 122 S. Ct. at 2437. In explicitly overruling *Walton* and specifically rejecting "the distinction relied upon in *Walton* between elements of an offense and sentencing factors,"[10] *Ring* fatally undermined *Hildwin*. Justice Shaw's concurrence in *Bottoson v. Moore*, 833 S.2d 693 (Fla. 2002), reasoned to this implication logically and concisely, as follows:

> • "The United State Supreme Court in *Ring v. Arizona*, 122 S. Ct. 2428 (2002), held that 'an aggravating circumstance necessary for imposition of the death penalty' operates as 'the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.'" *Bottoson*, 833 So. 2d at 715 (quoting 122 S. Ct. at 2241); *See also*, *Ring* at 2243.
>
> • "This holding in *Ring* appears to conflict with the following language in *Hildwin v. Florida*,

[10] "Arizona ... supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors. *See supra.*, at 2437-2438 [referring to *Ring*'s analysis of *Walton* as deriving this distinction from *Hildwin*] ... As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable; *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Ring*, 122 S. Ct. at 2441.

490 U.S. 638, 640 (1989): '[T]he existence of an aggravating factor here is not an element of the offense but instead is a sentencing factor that comes into play only after the defendant has been found guilty.' I assume, however, that the United States Supreme Court was aware of this language in *Hildwin*..." *Id.* at n.47.

- "Therefore, the holding in *Ring* can only have been 'intended to supersede' *Hildwin*'s analytic mainstay." *Id.*

As already noted, *a majority* of the *Bottoson* Court has in fact agreed that *Ring* does apply to §21.141, but declined to invalidate §921.141, claiming a lack of authority to do so and stating that *only* the United States Supreme Court had the authority to apply *Ring* to §921.141 because doing so would necessarily overrule *Hildwin* and other Supreme Court precedent. This issue is now squarely before this Court.

B. Almendarz-Torres Does Not Survive Ring

Almendarez-Torres v. United States, 523 U.S. 224 (1998), does not survive *Apprendi* and *Ring*, but rather fell along with *Walton* and *Hildwin*. In *Apprendi*, Justice Thomas – whose vote had been necessary to establish the five-justice majority in *Almendarez-Torres* – announced that he had reconsidered his *Almendarez-Torres* position and now believes it to be infirm:

> [O]ne of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given [here], it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing

> or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element.

Apprendi, 530 U.S. at 520-21. The *Apprendi* majority found no need to re-examine *Almendarez-Torres* in order to decide the issue before it, but acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided." *Id.* at 489. It then went on in a footnote to add to "the reasons set forth in Justice Scalia's *Almendarez-Torres* dissent, 523 U.S. at 248-60" the observation that "the [*Almendarez-Torres*] Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue," which drove the Sixth Amendment ruling in *Apprendi*. *Id.* at 489 n.15.[11] Thus, *Almendarez-Torres* does not survive *Apprendi* and *Ring*, and does not bar Van Poyck's *Ring* claim despite the fact that his aggravators included a prior felony conviction.

[11] The majority opinion in *Almendarez-Torres* relied upon *Macmillan v. Pennsylvania*, 477 U.S. 79 (1986), and, in so doing, refused to distinguish between a "sentencing factor ... [that] triggered a mandatory minimum sentence" in *Macmillan* and a "sentencing factor ... [that] triggers an increase in the maximum permissive sentence" in *Almendarez-Torres*, 523 U.S. at 244; *see generally Id.* at 242-46. That aspect of *Almendarez-Torres* has, of course, now been explicitly repudiated. *See Harris v. United States*, 122 S. Ct. 2406, 2419 (2002), decided together with *Ring*.

CONCLUSION

Wherefore, based upon all of the foregoing, Petitioner respectfully petitions this Court to grant *certiorari* review.

Respectfully submitted

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APPENDIX

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APPENDIX A

Supreme Court of Florida's Order, dated October 31, 2003 denying petitioner's motion for rehearing

Supreme Court of Florida

FRIDAY, OCTOBER 31, 2003

CASE NO.: SC02-2661
Lower Tribunal Nos.: 87-6736CFA02,
88-11116CFA02

WILLIAM VAN POYCK vs. JAMES V. CROSBY, JR., ETC.

Petitioner(s) Respondent(s)

Petitioner's Motion for Rehearing is hereby denied.

ANSTEAD, C.J. and WELL, PARIENTE, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

/s _____ (Seal)
Thomas D. Hall
Clerk, Supreme Court

tc
Served:

JEFFREY O. DAVIS
MARK E. OLIVE
CELIA A. TERENZIO

APPENDIX B

Supreme Court of Florida's Order, dated August 20, 2003 denying petition for Writ of Habeas Corpus

Supreme Court of Florida

WEDNESDAY, AUGUST 20, 2003

CASE NO.: SC02-2661
Lower Tribunal Nos.: 87-6736CFA02,
88-11116CFA02

WILLIAM VAN POYCK vs. JAMES V. CROSBY, JR., ETC.

Petitioner(s) Respondent(s)

The petition for writ of habeas corpus is hereby denied.

WELLS, PARIENTE, LEWIS, QUINCE, CANTERO and BELL, JJ., concur. ANSTEAD, C.J. concurs in conclusion; while I concur in denial, I would deny relief on petitioner's second issue without prejudice to raise this issue in the trial court.

A True Copy
Test:

/s (Seal)
Thomas D. Hall
Clerk, Supreme Court

tc
Served:

JEFFREY O. DAVIS
MARK E. OLIVE
CELIA A. TERENZIO

APPENDIX C

***Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990)**

WILLIAM VAN POYCK,
Appellant,

v. No. 73,662

STATE OF FLORIDA,
Appellee.

[July 5, 1990]
Rehearing Denied Sept. 4, 1990

PER CURIAM:

William Van Poyck appeals his convictions for first-degree murder, attempted first-degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter and his sentence of death imposed for the first-degree murder conviction. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm Van Poyck's convictions and sentences.

The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered

Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger. Although no bullet was fired, Turner stated that he heard the gun click. Turner then fled the scene when Van Poyck turned his attention to Valdez, who was smashing one of the windows on the van. After Van Poyck noticed that two cars had just driven into the alley, he and Valdez approached the cars and Van Poyck shattered the windshield of one of the cars with the butt of a gun. Van Poyck and Valdez then ran to a Cadillac parked in an adjacent parking lot and departed from the scene. A police officer, who arrived at the scene and witnessed the two men leaving, radioed for help and a chase followed. During the chase, Van Poyck leaned out of the car window and fired numerous shots at the police

cars in pursuit, hitting three of them.

Valdez eventually lost control of the Cadillac and the car crashed into a tree. Van Poyck and Valdez were immediately taken into custody and four pistols were recovered from the car: a Hungarian Interarms nine millimeter semiautomatic pistol, a Sig Sauer nine millimeter semiautomatic pistol, a Starr .22 caliber semiautomatic pistol, and Turner's Smith and Wesson .38 caliber service revolver.

Van Poyck, testifying in his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

The jury found Van Poyck guilty of first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aggravated assault, and aiding in an attempted escape. With regard to the first-degree murder charge, the jury was given a special verdict form which contained blanks for "premeditated murder," "felony murder," and "both." The jury returned the verdict form with "felony murder" and "both" checked and "premeditated murder" left blank.

In the penalty phase, the state presented Van Poyck's parole officer who testified that Van Poyck was on parole at the time of the incident and that he had three previous convictions, two for robbery and one for burglary. Other witnesses for the state included victims of these offenses. Van Poyck presented five witnesses in mitigation, including himself. A nurse from the Palm Beach County jail stated that he helped other inmates in various ways. His brother, who was also in prison, testified about their home life, explaining that their father was frequently away from home on business and their mother had passed away when Van Poyck was young. Van Poyck's aunt testified that for a period of time the family lived with a housekeeper, who

appeared to be strange and unstable. Van Poyck's stepmother testified about his family situation, noting that his brother and sister had juvenile records. She also indicated that Van Poyck felt remorse for his actions. Finally, Van Poyck testified in his own behalf, taking responsibility for the fact that Griffis was killed and expressing remorse for his actions.

By an eleven-to-one vote, the jury recommended the death sentence for the first-degree murder conviction. The trial judge imposed the death sentence and found the following four aggravating circumstances: (1) that the crime was committed while Van Poyck was under a sentence of imprisonment in that he was on parole when he committed the act; (2) that the crime was committed for the purpose of effecting an escape from custody; (3) that Van Poyck knowingly created a great risk of death to many persons; and (4) that Van Poyck was previously convicted of another felony involving the use or threat of violence to some person. In finding insufficient mitigating evidence to override the above aggravating factors, the trial judge stated in his order:

> The defendant presented evidence which attempted to show that he was under the influence of another person, to wit: his brother and/or Mr. O'Brien. This court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter- writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further, the defendant admitted on the stand that he was operating during the commission of this offense as a person responsible for his own acts and with knowledge of what he was doing.

The judge also rejected evidence of a difficult childhood:

> The only other potential mitigating circumstances for which evidence was presented was that ... Van Poyck's mother died when he was approximately eighteen (18) months of age. However, it was shown that he was subsequently raised in a good family and by people that cared for him. Further, the court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation.

The trial court also imposed upon Van Poyck six fifteen-year sentences for the six counts of attempted manslaughter, five years with a mandatory minimum of three for aggravated assault, fifteen years for aiding in an attempted escape, and life imprisonment for attempted first-degree murder. The trial judge stated that each of the above sentences should run consecutively.

Guilt Phase

Van Poyck raises the following six issues in the guilt phase of this appeal: (1) the trial court erred in not severing the multiple offenses in this case; (2) the evidence was insufficient to support a conviction for first-degree premeditated murder; (3) the evidence was insufficient to support a conviction for attempted first-degree murder; (4) the evidence was insufficient to support a conviction for aiding in an attempted escape; (5) the evidence was insufficient to support the convictions of six counts of attempted manslaughter; and (6) the convictions in issue (5) violated the rule of lenity.

With reference to the first claim regarding severance, all of the crimes arose out of a single criminal episode, which began with the unsuccessful attempt to free a prisoner and concluded in a police chase. We find that the trial court's denial of Van Poyck's motion to sever was consistent with *Florida Rules of Criminal Procedure 3.150(a)* and *3.152(a). Bundy v. State,* 455 So.2d 330 (Fla.1984), *cert. denied,* 476 U.S. 1109, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986); *Spivey v. State,* 533 So.2d 306 (Fla. 1st DCA 1988).

With regard to point two, we agree with Van Poyck that the evidence is insufficient to establish first-degree *premeditated* murder. The state's evidence was conflicting as to where Van Poyck was at the time of the killing. We note that the trial judge, in his sentencing order, was not sure of Van Poyck's whereabouts: "Van Poyck *may* have in fact been the individual who pulled the trigger and shot Fred Griffis." (Emphasis added.) Although the evidence was insufficient to establish first-degree premeditated murder, we find that the evidence was clearly sufficient to convict him of first-degree felony murder. While this finding does not affect Van Poyck's guilt, it is a factor that should be considered in determining the appropriate sentence.

The remaining issues concerning the sufficiency of the evidence and the violation of the rule of lenity are without merit. The evidence in this record clearly sustains those convictions.

Penalty Phase

Van Poyck raises fifteen issues in the penalty phase: (1) the trial court failed to properly consider the mitigating evidence; (2) the aggravating circumstance of knowingly creating a great risk of death to many persons is vague, overbroad, and capricious; (3) the trial court erroneously found the aggravating circumstance of knowingly creating a great risk to many persons; (4) the trial court erred in denying Van

Poyck's request for limiting jury instructions on the aggravating circumstance of knowingly creating a great risk of death to many persons; (5) the trial court failed to direct the jury to make a mandatory factual determination concerning Van Poyck's participation as prescribed by the United States Supreme Court's decisions in *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); (6) the trial court failed to make the required factual findings required by *Tison* and *Enmund* in its sentencing order; (7) the trial court violated Van Poyck's right to a fair trial by refusing to excuse pro-death jurors and attempting to exclude jurors opposed to the death penalty; (8) Florida's death penalty statute is unconstitutional as applied to this case; (9) the trial court gave Van Poyck insufficient time to obtain adequate medical examinations; (10) the trial court erred with regard to sequestering the jury; (11) the trial court improperly considered Van Poyck's prior convictions; (12) the trial court erred in finding the existence of an aggravating circumstance which duplicated an essential element of felony murder; (13) Van Poyck was denied his right to effective assistance of counsel during the penalty phase of the trial; (14) the death sentence is not proportional under these facts; and (15) Florida's death penalty statute is unconstitutional. After fully considering these issues in light of the record in this cause, we find no error which requires a new sentencing proceeding.

We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In *DuBoise v. State,* 520 So.2d 260 (Fla.1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is not the triggerman[12] and discussed proportionate punishment, stating:

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[12] *See, e.g.*, Copeland v. Wainwright, 505 So.2d 425 (Fla.), *vacated on other grounds, 484 U.S. 807, 108 S.Ct. 55, 98 L.Ed.2d 19 (1987); Jackson v. State, 502 So.2d 409 (Fla.1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987).*

> In *Tison* the Court stated that *Enmund* covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.' " Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "that *major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement."*

Id. at 265-66 (citations omitted, emphasis added) (quoting *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

We note that, although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and that issue is moot.

We find that none of the other claims merit discussion. Further, we conclude that each of the aggravating circumstances found by the trial judge was properly established in this record and that the trial judge could properly conclude that the aggravating circumstances outweighed the mitigating evidence in this cause. Accordingly, we affirm each of Van Poyck's convictions and sentences.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur.

564 So.2d 1066, 15 Fla. L. Weekly S379

APPENDIX D

December 21, 1988, Sentencing Order by the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY.

CRIMINAL DIVISION "V"

CASE NO.: 87-0736-CF A02
88-11116-CF A02

STATE OF FLORIDA

VS.

WILLIAM VAN POYCK,

Defendant.

ORDER

THIS MATTER is before the Court for Sentencing. The Court notes that the order will contain sentencing for each court and that the sentencing order will state the counts in the same order of the verdict form, not the order of the indictment.

COURT I: The jury having found the Defendant, WILLIAM VAN POYCK guilty of First Degree Murder and having by a vote of eleven to one made a recommendation of death it is the judgment and sentence of the Court that

WILLIAM VAN POYCK be sentenced to death for the murder of FRED GRIFFIS. Said sentence is to be carried out in accordance with the laws of the State of Florida.

The Court finds as aggravating circumstances the following:

1. The crime for which WILLIAM VAN POYCK is sentenced to death was committed while he was under a sentence of imprisonment in that he was on parole at the time of commission of this act.

2. The crime for which the Defendant is sentenced was committed for purpose of effecting an escape from custody and in this case to effect the escape of Mr. O'Brien.

3. The Defendant in the commission of this crime for which he is sentenced knowingly created a great risk of death to many persons; this includes the people at the scene of the murder to wit: Officer Steven Turner, Mr. Ruble and Mr. Zimmerman who work at Good Samaritan Hospital and upon hearing the shots went to check the matter out and saw Mr. Van Poyck point a firearm at them. After the incident a bullet hole was found in the nurses' residence next to the doctor's office where the murder occurred, in the direction and area Mr. Van Poyck had pointed the firearm at Mr. Ruble and Zimmerman. Further, Mr. & Mrs. Brown in the Cadillac that pulled up into the alley as the events occurred; the individuals in the doctor's office including but not limited to: Mrs. Oriole, Dr. Rosenberg, and Lisa Bancraft, who were looking out the windows and door, along with another witness, Heff who was standing in the alley watching all the events.

This Court believes that the chase that took place in Mr. Van Poyck and Mr. Valdez's attempt to escape from the scene where numerous police cars were fired at, approximately twenty shots total, on two of the busiest streets in Palm Beach County, (Palm Beach Lakes Blvd. & Australian Blvd.) Is a part of this

aggravating factor of knowingly creating a great risk of death to many persons, (see the convictions for counts 0 through 11).

4. The Defendant, WILLIAM VAN POYCK having previously been convicted of another capitol offense or felony involving the use of threat or violence to some person, in this case the prior conviction of the offense of robbery, which involved a shooting and chase.

Further this Court does not find that any mitigating factors exist or have been shown to exist. The defendant presented evidence which attempted to show that he was under the influence of another person to wit; his brother and or Mr. O'Brien. This Court finds that the evidence was totally lacking to establish in any way that mitigating factor based upon the fact that he clearly had had no contact with his brother for numerous years other than by infrequent letter writing and that he had in fact not seen Mr. O'Brien for a long period of time. Further the Defendant admitted on the stand that he was operating during the commission of this offense as a person responsible for his own acts and with knowledge of what he was doing.

The only other potential mitigating circumstance for which evidence was presented was that the Defendant, WILLIAM VAN POYCK's mother died when he was approximately eighteen (18) months of age. However it was shown that he was subsequently raised in a good family and by people that cared for him. Further the Court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation who retained Mr. Valdez to assist him and who checked the guns on the way to the location where the murder occurred to see to it that they were loaded. By all evidence Mr. Van Poyck was a major participate in this murder.

The Court further finds that the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree pre-mediated murder and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

COUNT II: This Court for the sentence of armed robbery with a firearm sentences the Defendant, WILLIAM VAN POYCK to a term of LIFE in the State Department of Corrections with a three year mandatory minimum sentence to run consecutive with any sentence prior imposed.

COUNT VI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense or attempted manslaughter, to run consecutive with any sentence prior imposed.

COUNT VIII: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of the charge of attempted manslaughter, said sentence to run consecutive to any sentence prior imposed.

COUNT IX: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the offense of attempted manslaughter, this sentence to run consecutive to any prior imposed.

COUNT X: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XI: This Court sentences the Defendant, WILLIAM VAN POYCK to 15 years for the conviction of attempted manslaughter, said sentence to run consecutive to any prior imposed.

COUNT XII. This Court sentences the Defendant, WILLIAM VAN POYCK to 5 years with a minimum mandatory sentence of 3 (three) years for the conviction of aggravated assault said sentence shall run consecutive to any prior imposed.

COUNT XIV. This court sentences Defendant, WILLIAM VAN POYCK to 15 years for the conviction of aiding in the attempted escape said sentence to run consecutive to any prior imposed.

For the conviction contained in information 88-11116-CF A02 this Court on the charge of Attempted First Degree Murder, this court sentences the Defendant to LIFE In prison to run consecutive to any prior imposed, with a 3 year mandatory minimum. This mandatory minimum 3 year sentence shall run concurrent with the mandatory minimum sentence contained in count two.

DATE AND ORDERED this ____ day of _____, 198__, in West Palm Beach, Palm Beach County, Florida.

_____
MICHAEL D. MILLER
CIRCUIT COURT JUDGE

EXHIBIT E

Excerpts of Penalty Phase Jury Instructions

In order to recommend a sentence of death, the jury must find that the Defendant killed or attempted to kill or intended or contemplated that a killing would take place, or that illegal force be employed.

However, if the jury finds that the Defendant was a major participant in the felonies committed and his actions showed a reckless indifference to human life, then the jury may recommend a sentence of death even if the Defendant did not actually kill or intend that a killing take place.

In determining this, you will rely on the same evidence that you heard in the first phase of this trial, along with any additional evidence offered in the second phase.

You will use the same rules for deliberation that you were given in the first instructions and weigh the evidence in the same manner.

Again, the burden of proof is on the State. The State must prove beyond and to the exclusion of every reasonable doubt that William Van Poyck caused or intended to cause the death of Fred Griffis or intended that illegal force be employed against Fred Griffis.

A reasonable doubt is designed as it was in the first phase and it may arise from the evidence, a conflict in the evidence or a lack of evidence.

Your verdict finding that William Van Poyck did or did not kill Fred Griffis, did or did not intend his death, or did or did not intend that illegal force be employed against Fred Griffis, must be by a majority of the jury.

EXHIBIT F

Jury Verdict Form

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
CRIMINAL DIVISION, IN AND FOR
PALM BEACH COUNTY FLORIDA

INDICTMENT NO: 87-6736CF A02

VERDICT

STATE OF FLORIDA)
)
)
VS.)
)
WILLIAM VAN POYCK)

AS TO EACH COUNT, CHECK ONLY ONE

COUNT ONE

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of FIRST DEGREE MURDER of Officer Fred Griffis, as charged in the Indictment.

We, the jury, also find that the Murder was:

a. First Degree Premeditated Murder ____
b. First Degree Felony Murder X
c. Both, First Degree Premeditated Murder and First Degree Felony Murder X

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of SECOND DEGREE MURDER of Officer Fred Griffis, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of THIRD DEGREE FELONY MURDER of Officer Fred Griffis, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of MANSLAUGHTER of Officer Fred Griffis, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT TWO

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ARMED ROBBERY WITH A FIREARM of Officer Steve Turner, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ROBBERY WITHOUT A FIREARM of Officer Steve Turner, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of GRAND THEFT of Officer Steve Turner, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty,

. . .

COUNT SIX

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Richard Hines, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Richard Hines, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Richard Hines, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Richard Hines, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT SEVEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Freddie Naranjo, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Freddie Naranjo, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Freddie Naranjo, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Freddie Naranjo, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm	__X__
b. without a firearm	_____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT EIGHT

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Geoffery Woodward, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Geoffery Woodward, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Geoffery Woodward, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Geoffery Woodward, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT NINE

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Dale Fell, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Dale Fell, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Dale Fell, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Dale Fell, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT TEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Robert Provost, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Robert Provost, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer Robert Provost, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Robert Provost, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT ELEVEN

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer John Woods, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer John Woods, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE FELONY MURDER of Officer John Woods, as contained in the Indictment,

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer John Woods, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT TWELVE

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of AGGRAVATED ASSAULT of Fred Brown, as charged in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED AGGRAVATED ASSAULT of Fred Brown, as contained in the Indictment,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ASSAULT of Fred Brown, as contained in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

COUNT FOURTEEN

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of AIDING IN THE ATTEMPTED ESCAPE of James O'Brien, as charged in the Indictment,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

INFORMATION NO. 88-11116-CF A02

__X__ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED FIRST DEGREE MURDER of Officer Steven Turner, as charged in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED SECOND DEGREE MURDER of Officer Steven Turner, as contained in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED THIRD DEGREE

FELONY MURDER of Officer Steven Turner, as contained in the Information,

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, guilty of ATTEMPTED MANSLAUGHTER of Officer Steven Turner, as contained in the Information,

We, the jury, also find that the crime was committed:

a. with a firearm __X__
b. without a firearm _____

_____ WE, THE JURY, find the Defendant, WILLIAM VAN POYCK, not guilty.

So say we all.

_____, 19__. _____
West Palm Beach, Florida.

EXHIBIT G

Constitutional Provisions and Statutes Involved

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

EIGHTH AMENDMENT: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty and property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2)

Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

Case No. 03-1127

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether Ring v. Arizona, 536 U.S. 584, rendered Florida's capital sentencing scheme unconstitutional?

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

OPINION BELOW

The order below has been referenced as Van Poyck v. Crosby, Case No. 02-2661.

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. §1257. Although this is the appropriate provision, the requirements of same have not been met.

STATEMENT OF THE CASE AND FACTS

The facts underlying Van Poyck's murder conviction and subsequent death sentence are as follows:

> The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was

a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger. Although no bullet was fired, Turner stated that he heard the gun click. Turner then fled the scene when Van Poyck turned his attention to Valdez, who was smashing one of the windows on the van. After Van Poyck noticed that two cars had just driven into the alley, he and Valdez approached the cars and Van Poyck shattered the windshield of one of the cars with the butt of a gun. Van Poyck and Valdez then ran to a Cadillac parked in an adjacent parking lot and departed from the scene. A police officer, who arrived at the scene and witnessed the two men leaving, radioed for help and a chase followed. During the chase, Van Poyck leaned out of the car window and fired numerous shots at the police cars in pursuit, hitting three of them.

Valdez eventually lost control of the Cadillac and the car crashed into a tree. Van Poyck and Valdez were immediately taken into custody and four pistols were recovered from the car: a Hungarian Interarms nine millimeter semiautomatic pistol, a Sig Sauer nine millimeter semiautomatic pistol, a Starr .22 caliber semiautomatic pistol, and Turner's Smith and Wesson .38 caliber service revolver.

> Van Poyck, testifying in his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

Van Poyck v. State, 564 So. 2d 1066, 1067-1068 (Fla. 1990), *cert. denied,* 499 U.S. 932 (1991).

On appeal, Van Poyck raised four challenges related to his status as the non-triggerman. They were as follows: (1) there was insufficient evidence to support a finding of premeditation; (2) the trial court's sentencing order did not properly set out the factual findings in support of the of the death sentence as required in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987); (3) death was disproportionate based on Van Poyck's non-triggerman status; (4) the trial judge failed to properly instruct the jury regarding what requisite circumstances must be present to impose death upon a non-triggerman. Van Poyck, 564 So. 2d at 1070.

Although the Florida Supreme Court found insufficient evidence of premeditation, death was still the appropriate sentence based on the following findings:

> We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In DuBoise v. State, 520 So. 2d 260 (Fla. 1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is not the triggerman n* and discussed proportionate punishment, stating:
>
> > In Tison the Court stated that Enmund covered two types of

cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted [**12] to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "that major

> participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement."
>
> Id. at 265-66 (citations omitted, emphasis added) (quoting Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)). Although the record does not [**13] establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony [*1071] murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Van Poyck, 564 So. 2d at 1070-1071.

Van Poyck filed a motion for postconviction relief in December of 1992. Following an evidentiary hearing, all relief was denied. Therein Van Poyck again presented issues related to his status as the non-triggerman. Those issues were as follows; (1) trial counsel was ineffective for failing to present evidence that Van Poyck was not the shooter; (2) trial counsel was ineffective for allowing the state without objection to shift the burden to Van Poyck to prove that he was not the shooter; (3) the state withheld evidence regarding the true identity of the triggerman; (4) the jury impermissibly relied on the erroneous information that Van Poyck was the shooter; (5) the trial court instructed the jury on an erroneous version of the Enmund/Tison standard, and the trial court itself applied that same incorrect standard. All relief was denied. Van Poyck v. State, 694 So. 2d 686, 689, 698 (Fla. 1997), *cert. denied*, 522 U.S. 995 (1997).

In his state habeas petition, Van Poyck argued that his death sentence was unconstitutional because the judge and jury wrongly considered as a factor that he was the shooter. Van Poyck v. Singletary, 715 So. 2d 930, 931 (Fla. 1998), *cert. denied*, 526 U.S. 1018 (1999). All relief was denied.

In February of 1999, Van Poyck filed a federal habeas petition. The district court denied all relief. Van Poyck presented the following issues regarding his status as the non-triggerman on appeal: (1) trial counsel was ineffective for not presenting evidence that Van Poyck was not the triggerman; (2) the judge and the jury improperly considered that Van Poyck was the shooter; (3) the state withheld evidence establishing that Van Poyck was not the shooter. Again all relief was denied. Van Poyck v. Moore, 290 F.3d 1318 (11th Cir. 2002), *cert. denied*, 537 U.S. 812 (2002).

Van Poyck filed a successive habeas petition in the Florida Supreme Court in December of 2002. Therein he alleged that Ring v. Arizona, has implicitly overruled Cabana v. Bullock, and Hildwin v. Florida. Because the jury in the instant case was never required to put in writing their findings regarding Van Poyck's culpability pursuant to Enmund v. Florida, and Tison v. Arizona. and because the Florida Supreme Court made additional findings regarding Enmund/Tison, Van Poyck's sentence is a violation of the Sixth Amendment. The Florida Supreme Court entered its order denying the petition on August 20, 2003. (B-1). A motion for rehearing was denied on October 31, 2003. (A-1). Petitioner is now seeking certiorari review in this Court.

REASONS FOR DENYING THE WRIT

THE CLAIMS ARE PROCEDURALLY BARRED, RING DOES NOT APPLY RETROACTIVELY AND RING DOES NOT APPLY TO FLORIDA'S CAPITAL SENTENCING LAW.

Van Poyck claims that review is warranted because the Florida Supreme Court's appellate findings regarding Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987), are now constitutionally suspect in light of Ring v. Arizona, 536 U.S.84 (2002). Van Poyck alleges that Ring has implicitly overruled both Hildwin v. Florida, 490 U.S. 638 (1989), and Cabana v. Bullock, 474 U.S. 376 (1986). He asserts that Enmund/Tison findings must be made in writing by a jury. Van Poyck raised this claim in a successive state habeas petition to the Florida Supreme Court. Following the state's response the Court summarily denied the petition finding it procedurally barred. (B-1). Certiorari review is not warranted for a number of reasons.

First, Van Poyck cannot establish the requisite jurisdiction because the "decision" of the state's highest court was not based on any application of federal law. Rather, Van Poyck's claim was summarily denied because it was procedurally barred under state law. See Johnson v. Singletary, 647 So. 2d 106, 109 (Fla. 1994)(ruling that issue raised in successive petition is procedurally barred if basis for claim was available at time of first petition); Card v. Dugger, 512 So. 2d 829, 830-831 (Fla. 1997)(same). Although Van Poyck has raised a number of variations regarding his Enmund/Tison claim, he has never argued that the Sixth Amendment requires a jury finding pursuant to Enmund/Tison or that such a finding be in writing.[1] That state procedural default is

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[1] The wherewithal to advance this claim was available to Van Poyck at the time of his trial. See Chandler v. State, 423 So. 2d 171, 173 n. 1 (Fla. 1983). Van Poyck never raised such a claim until the successive habeas petition.

an adequate and independent state ground, which precludes further review. Sochor v. Florida, 504 U.S. 527, 534 (1992)(holding this Court was without authority to address a claim that the Florida Supreme Court had found to be not preserved for appeal). In Coleman v. Thompson, 501 U.S. 722, 729 (1991), this Court reaffirmed that "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." In essence the state procedural bar attached to this claim would render any opinion from this Court as a nullity. See Lambrix v. Singletary, 520 U.S. 518, 523 (1997)(finding lack of jurisdiction to review independently supported judgments on direct appeal and observing that because the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory). Thus, this Court lacks authority to review a question of federal law because the state court's decision rested on state law ground that is independent of the federal question and adequate to support the judgment.

Even if the claim was not procedurally barred under state law, there would still be no reason to grant review in this matter. Petitioner would be entitled to no relief because Ring does not apply retroactively. Van Poyck's conviction became final in May of 1991, when this Court denied certiorari. Ring was not issued until June 24, 2002. As such, in order for Petitioner to benefit from Ring, it either had to be a change in substantive law[2] or meet one of the two exceptions under Teague v. Lane, 489 U.S. 288 (1989). However, Ring is procedural and meets neither exception.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court expressly stated that the new rule announce in that case was procedural. Id. at 475 ("The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is.") In Ring, this Court determined that Apprendi

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[2] Bousley v. United States, 523 U.S. 614, 620 (1998).

applied to Arizona's capital sentencing scheme. Id. at 596-97. As Apprendi is a procedural rule, its application to Arizona's capital sentencing scheme in Ring is also a procedural rule. Moreover, Ring did not alter what had to be found or by what burden of proof; it merely changed the fact finder. In United States v. Gaudin, 515 U.S. 506, 521 (1995), this Court determined that a jury, rather than a judge, had to find the materiality element of perjury. Yet, this Court stated that such a change of "fact finders" was a procedural change. Id. As such, Ring is procedural, and Teague applies.

Moreover, Ring does not satisfy either of the Teague exceptions. The first Teague exception applies to cases that decriminalize certain conduct or prohibit a form of punishment on a class of defendants. Ring did neither of these things. Ring merely shifted the fact finding role in Arizona's capital sentencing scheme from the judge to the jury. As such, the first Teague exception does not apply.

The second Teague exception applies to watershed rule of criminal procedure that "are implicit in the concept of ordered liberty." Id. at 307. In order for this exception to apply, the failure to use the new rule must "create[] an impressibly large risk that the innocent will be convicted," and the new rule must "implicate the fundamental fairness of the trial." Id. at 312. Again, Ring does not meet this exception. In Ring, this Court noted that it was not requiring a jury finding of an aggravator because it perceived that such a procedure was more reliable or fairer. Id. at 607. In fact, in Proffitt v. Florida, 428 U.S. 242, 252 & n.10 (1976), this Court noted that a judge's involvement in sentencing would lead to fairer sentencing. As such, Ring fails the second exception to Teague.

This Court has refused to apply Duncan v. Louisiana, 391 U.S. 145 (1968), which applied the Sixth Amendment right to a jury trial to the states, retroactively. DeStefano v. Woods, 392 U.S. 631, 633 (1968). It is illogical that application of the Sixth Amendment right to jury trial as a whole would not be retroactive but a change in fact finder regarding one element would be. As

such, Ring is not retroactive, Petitioner is not entitled to its alleged benefit and resolving Petitioner's alleged conflict would not affect the judgment in his case. Certiorari should be denied.

Moreover, a number of Courts of Appeal and state appellate courts that have addressed the retroactivity of Ring have held that it does not apply retroactively. Turner v. Crosby, 339 F.3d 1247, 1279-86 (11th Cir. 2003); Szabo v. Walls, 313 F.3d 392, 389-99 (7th Cir. 2002); State v. Towery, 64 P.3d 828 (Ariz. 2003); Head v. Hill, 587 S.E.2d 613, 618-18 (Ga. 2003); State v. Lotter, 664 N.W.2d 892, 903-09 (Neb. 2003); Colwell v. State, 59 P.3d 463, 469-73 (Nev. 2002); Ex Parte Briseno, 2004 Tex. Crim. App. LEXIS 199, *22-23 (Tex. Crim. App. Feb. 11, 2004); see also In Re Johnson, 334 F.3d 403 (5th Cir. 2003)(noting that issue was not properly before court but suggesting Ring not retroactive). Further, Ring arises from application of Apprendi, to Arizona's capital scheme. Every federal circuit court to address the issue has found that Apprendi is not retroactive. E.g., Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); United States v. Swinton, 333 F.3d 481 (3rd Cir. 2003); United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001)(finding that Apprendi's requirements of jury finding beyond a reasonable doubt of fact that increases statutory maximum for an offense "are not the types of watershed rules implicating fundamental fairness that require retroactive application."); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Goode v. United States, 305 F.3d 378 (6th Cir. 2002)("Apprendi does not create a new 'watershed rule.'"); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Moss, 252 F.3d 993, 996-1001 (8th Cir. 2001)("Apprendi is not of watershed magnitude."); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). Thus, Ring does not apply to Van Poyck's claim. Certiorari should be denied.

Third, irrespective of the procedural bar and the fact that Ring would not be given retroactive application, Ring is

inapplicable in Florida. In Apprendi, this Court held that any fact, other than a prior conviction, that increased the statutory maximum sentence for a crime had to be presented to a jury and proven beyond a reasonable doubt. 530 U.S. at 940. In Ring, this Court held that Apprendi applied to Arizona's capital sentencing scheme based on the Arizona Supreme Court's holding that the statutory maximum for first degree murder in Arizona was life until an aggravator was proven. 536 U.S. at 603. In Harris v. United States, 536 U.S. 545 (2002), this Court made clear that its holding in Apprendi (and its progeny Ring) did not apply to all sentencing consideration. Instead, Apprendi (and its progeny Ring) only applied to those facts, other than a prior conviction, that increased the statutory maximum for a crime. Thus, to determine the applicability of Ring and Apprendi to any particular crime in any particular state, it is necessary to determine what the statutory maximum for that crime is in that state and whether that statutory maximum is increased by any fact finding.

Both before and after Ring, Florida Supreme Court has repeatedly held that a capital defendant is death eligible upon conviction for first degree murder, since the death penalty is the maximum sentence for first degree murder in Florida.[3] Mills v. Moore, 786 So. 2d 532, 536-538 (Fla.), cert. denied, 532 U.S. 1015 (2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, 536 U.S. 962 (2002); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) ("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death"); Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002) ("This Court has defined a capital felony to be one where the maximum possible punishment is death"). Moreover the Florida Supreme Court has consistently rejected the position that a factor is an element of capital murder under Florida's statutory scheme. See Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will

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[3] Van Poyck claims that a majority of the Florida Supreme Court has sated that Ring applies to Florida's sentencing statute. Van Poyck is incorrect.

present at sentencing or a special verdict form indicating the aggravating factors found by the jury). Because Ring holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury, and because death is the statutory maximum for first degree murder in Florida, Ring does not establish Sixth Amendment error under Florida's statutory scheme. Mills 786 So. 2d at 532; Mann, 794 So. 2d at 599; Porter, 840 So. 2d at 986; Shere, 830 So. 2d at 61. As such, nothing is increasing the statutory maximum in Florida. Thus, Ring does not apply to Florida.

In summary, review is not warranted. Van Poyck's Sixth Amendment challenge to his death sentence is procedurally barred; it is based on a case, i.e., Ring that is not subject to retroactive application; and Ring does not apply to Florida's sentencing scheme.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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